No. 246.

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Clerk.

Brief of Darlington for Defs in Error

IN THE

Supreme Court of the United States.

Filed April 10, 1899.

OCTOBER TERM, 1898.

LUCY T. DAVIS ET AL.,
vs.
LOUIS COBLENS ET AL.,
No. 246.

BRIEF FOR DEFENDANTS IN ERROR.

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STATEMENT.

This was an ejectment suit, in which the defense was adverse possession. The cause is here upon appeal by the plaintiffs, principally because of the trial court's refusal to instruct the jury that there was no evidence of adverse possession for the statutory period of twenty years.

The ground in question—lot 10, square 1031—was allotted to Abraham Young, in the division between the United States Commissioners and the original proprietors, and, in partition proceedings between his heirs after his death, passed to his son, Richard Young, who was the common source of title. The lot was sold and conveyed under a judgment against Richard Young, in 1826, to Anthony Holmead, jr., and title thereafter passed regularly by a series of conveyances to the defendants. Prior

to the execution sale, however, namely, in 1818, Richard Young had conveyed the lot by deed of trust to William A. Bradley, trustee, to secure an indebtedness to James B. Holmead.

Some three quarters of a century after these transactions, it occurred to one John H. Walter and Bartow L. Walker, who appear to have been engaged extensively in speculation in old titles, that something could be made by raising the question of the invalidity of this execution sale, and of alleged irregularities of title affecting some fifty other lots formerly owned by Richard Young, although all the contemporaneous parties, who must have been familiar with the facts, had been entirely satisfied with the sale; and, accordingly, in conjunction with the plaintiff, Millard P. McCormick, who was a son of one of the heirs of Richard Young, deeds were obtained upon nominal consideration from the heirs who were *sui juris*, and by a proceeding in equity, which was before the Court of Appeals of the District of Columbia for review in Walter *vs.* Slater, 5 D. C. App. 357, it was attempted to vest title in trustees for the purpose of bringing suits, effecting compromises, and realizing generally whatever might be obtainable. Record, pp. 15-16. That court having held the equity suit a nullity, Walter's interest having passed to other parties through compromises or transactions among themselves, and Walker having vested his interests in the Virginia-Alabama Company, a corporation organized by him "to acquire, hold, own and dispose of real estate in fee simple and less estates, including equities and undivided interest therein," etc., the present action was instituted May 17, 1895, the plaintiffs claiming, nominally, a ninety-nine one-hundredths interest.

Some questions as to the operation of the statute of

limitations grew out of the following facts:

Richard Young died in 1860, devising his residuary estate, which included the ground in controversy if it belonged to him at all, to his wife Matilda for life, with remainder in fee to his children, Lucy A. M. Bevens, Tracenia Latimer, Sophronia Magruder, Elizabeth T. B. McCormick, and Brook W. Young. The life tenant, Matilda, died in October, 1874, leaving the four female remaindermen all *femes covert.* Under the amendment made by the plaintiffs after close of the testimony (Record, p. 20), only plaintiffs claiming under Elizabeth T. B. McCormick, and partial interests under Tracenia Latimer, Sophronia Magruder and Brook W. Young are left in the case

Tracenia Latimer died November 15, 1879, leaving a husband, who died April 20, 1880, and two children, one of whom, Charles M. N. Latimer, has been eliminated by the amendment, and the other of whom is Lucy T. Davis, who was married prior to the death of Matilda, the life tenant. Sophronia Magruder died "about the year 1880 or 1885," having survived her husband, and leaving two children, Ella, married to Samuel Cox in the life time of the said Sophronia, and Richard Y. Magruder, one-half of whose interests went to Walker, and, through him, to the Virginia-Alabama Land Company. Elizabeth T. B. McCormick was married prior to 1860, and died in 1889, having previously conveyed her interest in the property to the plaintiff, Millard P. McCormick.

On March 8, 1875, one Isaac P. Childs, grantee of the whole of square 1031, established a brick yard upon it, which occupied the entire square, the first structures erected by him being two brick kilns on lot 10. He and his grantees continued to hold and use it openly, notoriously, exclusively, continuously and in a manner hostile

to all the world until January, 1892, when he and his grantees sold and conveyed it to the defendants for $67,000, of which $30,000 was paid in cash, and $37,000, deferred purchase money, was secured upon the ground by a still existing deed of trust, upon which the defendants have ever since paid the interest. Childs and his grantees remained in possession, paying rent to the defendants, until October, 1893, and were tenants holding over for some time after the last-named date. The brick in the kilns on lot 10 were in process of removal during the winter of 1893–'94—the testimony of the plaintiffs in rebuttal fixing the time as about March or April, 1894. The defendants' testimony further tended to show that a part of the machinery was not removed until May, 1895; that the machine house was located on the north part of lot 1 (which is contiguous to the south part of lot 10), and that the machinery in question was north of the machine house, and probably on lot 10; that some of the brick were left on the ground; that these brick, though simply left there by Childs, were suitable for use in building, and are still there; that the foundations of the brick kilns are still standing; that, in the latter part of March or the first of April, 1894, the defendants rented the entire square to one Downing, who occupied and sublet a house located on lot 7, and prevented various parties from making any use of the square, and who remained as tenant in occupation of the square until June, 1895; that a Mrs. Schulz then rented the house, with the privilege of using the entire square, provided she neither placed nor permitted others to place anything unlawful upon it, and that she had prevented persons from dumping earth upon it or driving across it. In November, 1893, before Childs left it, the defendants had erected four signs, about four feet square, one at each corner of

the square, one of which was located on lot 10, to the effect that the entire square was for sale, or rent, on application to them. The defendants also proved the payment of taxes by them, and those under whom they claimed, from 1875, down to the time of the trial.

Assignments of Error.

Except the tenth, which seems not to be relied upon, or to require discussion (Holtzman vs. Douglass, 168 U. S., p. 285), the appellants' assignments of error, eleven in number, present seven legal propositions, namely .

I. That the court erred in permitting cross-examination of the witness Walter, tending to test his memory and probable accuracy of recollection as to a fact testified to by him.

II. That the court erred in admitting testimony tending to prove color of title on behalf of the defendants.

III. That the court erred in refusing to instruct the jury that there was no evidence of twenty years' adverse possession in favor of the defendants.

IV. That the court erred in refusing to instruct the jury that no adverse possession had been shown as against those of the plantiffs who claim under Tracenia Latimer and Elizabeth B. T. McCormick.

V. That the court erred in refusing to instruct the jury as to the effect of a segregated part of the testimony of one witness, upon one point in the case.

VI. That the court erred in refusing to instruct the jury to believe the testimony of the witness Walter, not affirmatively contradicted.

VII. That the court erred in instructing the jury that unless each of the plaintiffs was entitled to recover, the verdict should be for the defendants.

I.

The first of these assignments of error relates to the cross-examination permitted by the court of the witness John H. Walter.

The title asserted by the plaintiffs, Latimer, Davis and the Virginia-Alabama Land Company, depended in part upon a deed from John H. Walter, which expressly excepted the lands which had been conveyed by said Walter to other persons prior to its execution. It therefore became incumbent upon the plaintiffs to show that lot 10, in square 1031, did not fall within this exception.

Maxwell Land Grant Co. *vs.* Dawson, 151 U. S. 586.
Reeves *vs.* Low, 8 D. C. App. 105.
Hammond *vs.* Inloes, 4 Md. 175.
Jay *vs.* Michael, 82 Md. 1–12.

To meet this requirement of their case, instead of introducing testimony as to the state of the land records upon this question, or at least having their witness Walter review his numerous and complicated conveyances in transactions of this charcter and testify from some examantion of them in regard to lot 10, they chose to rest this part of their case upon his off-hand recollection that he had not conveyed it, admitting that he had made no such review of them, and was unable to state how many conveyances he had made respecting the fifty or more lots which came to him through these same deeds from the Young heirs, on which the claim of title through him to the lot in controversy rested. Record, p. 10. He at first testified (Record p. 8), and repeated it against the warning objec-

tion of plaintiffs' counsel (p. 10), that he had never made any deed affecting lot 10, except the one under which the plaintiffs were claiming, although the deeds offered in evidence by them showed a prior deed by him to his associate Walker for a half interest in all the lots he had obtained through deeds from the Young heirs, lot 10 included ; which inaccuracy he could only explain, after it was pointed out to him, by claiming to have understood the question to refer to a matter which had not been mentioned throughout his examination, by either side.

The present objection is that, under the circumstances, the court permitted the defendants, on cross-examination, to interrogate the witness as to the very large number of deeds, some two hundred or more, which had been made to and by him, many of them including fifty or more squares or parts of squares in a single conveyance, and to show that he had not reviewed these numerous conveyances recently or taken any steps to verify his statement or impression that lot 10 had not been included in any of them.

That this latitude of cross-examination was not only within the discretion of the trial justice but that, under the circumstances it was absolutely the right of the defendants, is respectfully submitted. The circumstance that such cross-examination brought to light some facts which the plaintiffs' counsel conceived to be prejudicial to the witness and to certain of the plaintiffs who were associated with him in his transactions, could not deprive the defendants of that right.

II.

A second assignment of error, considered here because of its connection with the preceding, is to the court's refusal to instruct the jury that they were bound to believe

the testimony of Walker upon this point, from the fact that it had not been negatived by testimony in contradiction on the part of the defendants.

No precedent, it is believed, exists for the requirement that a trial court shall select particular items of the evidence, testified to by a single witness, when better evidence was available, and shaken by the evident absence of any attempt or effort upon the part of the witness to be accurate about it, and shall instruct the jury that they are bound to believe his statement. Enough appears in the Record to show that, on a material point where much was involved, the testimony of Walter was anything but satisfactory, and that not the slightest attempt had been made to refresh his memory or secure accuracy. In addition, his bearing upon the stand, his manner of testifying, his appearance, his evident candor or the want of it, and the like, were all entitled to be considered by the jury as well as by the trial court, and may well have justified the former in discrediting him, or the latter in being unwilling to interfere with their conclusions as to the weight to be given to his testimony.

The point becomes wholly immaterial, anyhow, in view of the verdict. Only partial interests of any of the plaintiffs rested upon the deed from Walter containing the exception in question; the verdict was against the plaintiffs, as to all the interest claimed by them, and, therefore, could not have been at all affected by that deed, or the exceptions contained in it. That judgment will not be reversed, even for error, if the appellant was not injured thereby, is a familiar rule.

Gilbert *vs.* Moline Plough Co., 119 U. S. 491.
Glenn *vs.* Sumner, 132 U. S. 152, 157.
W. & G. RR. Co. *vs.* McLane, 25 Wash. Law Rep., p. 486.

III.

The third assignment of error is to the admission by the court of the docket entries of the late circuit court, loss of the original papers having been first proved, to show recovery of the judgment against Richard Young, and levy upon lot 10 thereunder, constituting in part the color of title under which the defendants claimed. The action of the court in the admission of this evidence, it is submitted, was entirely correct, and, if it had not been so, the mere objection of the plaintiffs, unaccompanied by the statement of any grounds of objection is insufficient, under repeated decisions of this and other courts.

Washington Gas Light Co. *vs.* Poore, 3 App. D. C. 134–135, and citations.

Patrick *vs.* Graham, 132 U. S. 627.

IV.

The fourth alleged ground of error, covering the third, fourth, and fifth assignments of error as enumerated by plaintiffs, consisted in the court's refusal to instruct the jury, as prayed in the first three instructions offered by them, that there was no evidence from which they could find twenty years' adverse possession by the defendants and those under whom they claimed.

From March 8, 1875, to January, 1892, Childs and his grantees occupied, as owners, the whole square as a brickyard. From January, 1892, to October, 1893, they continued in such actual occupation as tenants of the defendants, their grantees, paying rent therefor. After October, 1893, they were tenants holding over, not disputing the defendants' title, as they could not do, being their tenants, and not completing the removal of the kilns, in so far as these were removed, according to the plaintiffs' own testimony, until March or April, 1894.

The machine-house, located before the jury on a plat, not reproduced in the record, stood at the northern extremity of lot one, and, north of it lay, until May 1895, large rollers and other machinery which it required two four-horse wagons to remove. Some of the brick, which were such as are used in building, remained on the ground, as did the foundations of the kilns, down to the time of the trial—a use than which it is not easy to conceive one more sharply distinctive and adverse. Holtzman *vs.* Douglas, 5 App. D. C., 397–410; S. C. 168 U. S. 278.

In the latter part of March or the first part of April, 1894, the defendants had rented the entire square to the witness Downing, who remained in possession until after this suit was instituted, living on lot seven, claiming and asserting his rights as tenant of the defendants over the entire square, and preventing third parties from using it, or any part of it; and, in addition, the defendants had then posted the entire square, lot ten specifically included, with signs, each four feet square, to the effect that the entire square was for sale or rent on application to themselves, these signs having been erected in November, 1893.

To this is to be added the fact that no payment of taxes, and no exercise of any right of ownership over the property, by the plaintiffs or those under whom they claim was attempted to be shown since 1826, when the property was sold at the execution sale to Anthony Holmead, under whom the defendants claim; and, as the record shows, the taxes had been paid by the defendant and those under whom they claim from 1875 down to the time of the trial.

It is true that the brick which remained on lot ten were simply left there by Childs, not sold by him to the defendants; but this cannot alter the effect as to the

notice which they gave of adverse possession. They were upon the ground, and gave the same notice to the plaintiffs and the world at large that they were there by authority of persons claiming the right to use the ground for that purpose as if the defendants had bought them of Childs and Son; and, in connection with this notice, the payment of taxes "was powerful evidence of a claim of right to the whole lot."

Had Childs and Son left there a fence, or an entire brick kiln, or any number of them, which the defendants had not purchased but permitted to remain there, the legal effect as notice would have been the same.

To contend that, upon these proofs, there was no evidence to go to the jury of adverse possession is to ignore the law of adverse possession as laid down by this court, by the courts of the District of Columbia and by all the authorities.

> "It is well-settled law that, for the purpose of a title by adverse possession, actual inclosure is not necessary, and that any occupation of the property, visible and notorious, of which the property is susceptible, and which excludes the true owner from it, is sufficient."

Holtzman *vs.* Douglass, *supra*; citing Ellicott *vs.* Pearl, 10 Pet. 412: Ewing *vs.* Burnett, 11 Pet. 41.

> "Nor should the fact be ignored, in this connection, that for upwards of twenty years the record-owners of this property wholly neglected their duties to the public in regard to it, never sought to pay the taxes, and permitted the defendants to discharge the burden which it was incumbent upon themselves to bear, and it might well be supposed that they had abandoned the property and acquiesced in the title which the defendants had acquired.

> In the case of Ewing *vs.* Burnett, 11 Pet. 41,54, the Supreme Court of the United States said that 'the uninterrupted payment of taxes on the lot for twenty-four successive years (by the party in possession) was *powerful* evidence of a claim of right to the whole lot.' And we are disposed to hold, in accordance with that view, that there was ample evidence in this case to go to the jury to show the claim of the defendants and the nature and extent of it from the year 1867."

Holtzman *vs.* Douglass, *supra.*

See also—

Miller et al. *vs.* Shaw, 7 S. & R. 136.
Farrar *vs.* Fessenden, 39 N. H. 277.
Watkins *vs.* Holman et al., 16 Pet. 54.
Coleman *vs.* Billings, 89 Ill. 189.
Booth *vs.* Small, 25 Iowa, 178–181.
Clement *vs.* Perry, 34 Iowa, 567.
West *vs.* Lanier, 9 Hump, 762.

The evidences of adverse possession were more numerous, and, to say the least of them, in no respect less strong, in the case at bar than in Holtzman *vs.* Douglass. Indeed, the two cases are in all material respects quite similar.

V.

The fifth ground of exception, embracing the plaintiff's sixth assignment of error and the rejection of their fourth prayer for instructions, is the court's refusal to instruct that no adverse possession had been shown as against the plaintiffs claiming under Tracenia Latimer and Elizabeth T. B. McCormick.

The basis of this exception lies in the fact that, when the adverse possession began, Mrs. Latimer was a married

woman, and that, at her death, her daughter, the plaintiff Lucy T. Davis, was also under coverture. The death of Mrs. Latimer occurred in 1879, and that of her husband in 1880; so that the ten years allowed persons under disability within which to bring suit expired long before the institution of this action, unless the disability of Mrs. Davis can be tacked to that of her mother, Mrs. Latimer. The statute, 21 James 1, Ch. 16, requires actions like the present to be brought within twenty years after they accrue, except that, in case of infancy, coverture and the like, the disabled person, or his heirs, may sue within ten years after the termination of the disability.

The heir, however, has ten years after the disability is removed, only in case the unexpired portion of the original twenty years does not exceed that time. Where, as in the present instance, fifteen years of the original twenty remained after termination of the disability, the heir has no additional time.

Ang. Lim., §481, and App. IV.

Unless, therefore, Mrs. Davis can claim exemption from the provisions of the statute because the termination of her mother's coverture found her laboring under the same disability—if, since the Married Women's Act, it be a disability—then the plaintiffs' fourth instruction was properly refused.

The precise point was decided by the Supreme Court of the United States in Mercer *vs.* Selden, 1 How. 52–3, 55, the decision of the court in which case removes the question from the field of discussion.

At the trial court, and in the Court of Appeals, as is shown by the opinion of the latter tribunal, the objection to the rejection of this fourth instruction was based solely upon the ground that Mrs. Davis was a *feme covert* at the

death of her mother, Mrs. Latimer, and therefore entitled to the same protection as the latter against the operation of the statute. In this court, for the first time, an additional point is raised, namely, that the death of Mrs. Latimer in the life-time of her husband presents some analogy to cases in which the late Civil War was held to have suspended the operation of this statute, notwithstanding the fact that Mrs. Davis, their daughter, allowed fifteen years instead of ten to elapse after the death of the survivor of them before instituting her suit.

The claim now presented on her behalf seems to be that, although the statute of limitations began to run against her mother, through whom she claims, certainly as early as March, 1875; and though no coverture, infancy, insanity or other disability of any kind could thereafter stop it, it was nevertheless arrested by the fact that, upon the death of the mother, the title descended to one in privity of law with herself, in such sense that she should have more than the ten years provided by the statute within which to bring her action after all obstacles were removed.

The sole authority cited, Marple *vs.* Myers, 12 Pa. St., 123, was a case in which the action was brought within much less than ten years after removal of the disability. The tenant by courtesy conveyed his interest to the plaintiffs, the heirs of his deceased wife, in 1845, and the case was heard and decided in the Supreme Court in 1849, only about four years later.

The latter court, it is true, referring in its opinion to the mother and aunt of the plaintiffs, both of whom were under coverture throughout the period of adverse possession, said: "The operation of the statute being thus suspended until their deaths, their estates were up to that period as unaffected by it as though no hostile possession existed."

This, however, must have been addressed to a statute differing materially in its provisions from that of 21 Jac. I, Ch. 16, Sec. 2, in force here, or must not have been intended to be taken as broadly as the language use is capable of being construed. The court could not have meant that these *femes covert*, the statute once having begun to run, could have maintained an action at a later period than twenty years from its commencement, or ten years from removal of their disability; or, if so, its language must be taken as the expression of an opinion upon a point not presented by the case before it. Certainly, no reason can be urged in favor of the application of such a principle to cases like the present, and the entire policy of the statute, and public policy as well, are opposed by it.*

VI.

A sixth ground of exception, embracing the plaintiffs' seventh assignment of error and the rejection of their fifth prayer for instructions, may be briefly disposed of. A witness, having shown that the machine-house was erected on the north part of lot one, which adjoins the south part of lot ten, and that two rollers and a quantity of smaller machinery were scattered over the ground north of this machine-house, added "I don't know but that the *rollers* might have been on lot ten;" whereupon the court was asked to instruct the jury that, because of the quoted expression of the witness, they must find that no part of the machinery was on lot ten.

If it had been the duty of the court to pass upon segregated portions of the testimony, which all the authorities deny, still the plaintiffs would not have been entitled to the instruction, couched in the terms in which it was presented.

*Further reference upon this point is respectfully made to the following authorities:
McDonald v. Hovey, 110 U.S., 621-2.
Gibson v. Ruff, 8 D.C. App., 262 and citations
Angell on Lim., Sec 478.
21 Jac. 1, ch. 16, Secs. 1 and 2.

The court did instruct the jury to find twenty years actual, exclusive, open, notorious, continuous and hostile possession of the ground in controversy as a prerequisite to a verdict for the defendants, and instructed them that no possession of any portion of square 1031 was an adverse possession against the plaintiffs unless such possession was actually extended to lot ten for the full, uninterrupted period of twenty years prior to the institution of the suit. This instruction stated the law as fully and as strongly in favor of the plaintiffs as they were entitled to and, it is believed, considerably more so.

VII.

The final ground of exception is the granting of the defendant's prayer, at page 22 of the Record, that, unless each of the plaintiffs was entitled to recover, no one of them could do so.

This instruction was granted by the trial court upon the twofold ground, first, that it had always been the rule in actions of ejectment, and, secondly, upon the broader ground that in all actions, whether *ex contractu* or *ex delicto*, too many parties plaintiff are fatal, at any stage of the cause, to recovery on behalf of any.

The first of these grounds being sustained by the Court of Appeals in its opinion, Record, pages 29–30, the question is there rested upon it alone. Its reasoning is attacked on behalf of the appellants upon the claim that the rule in question was applicable only to the action of ejectment based upon the fictions upon which that action formerly rested; and that it is without application where fictions are abolished, and the plaintiffs sue, not upon a joint demise, or as joint tenants, but as tenants in com-

mon. No authorities for this is cited, and none, it is believed, can be found.

In Chandler et al. *vs.* Simons, 97 Mass. 508, 515, the plaintiffs were tenants in common, one of whom was entitled to recover and the other was not. It was held that the statutes of 1785 and 1828, permitting co-heirs, joint tenants and tenants in common either to sever or to join in real actions, did not alter the rule that, if the right of any joint demandant to recover proves defective, the action must fail, unless the writ is amended by striking out such party before verdict. See, also, Poole *vs.* Robinson, 10 Mass. 179; Kelley *vs.* Meins, 135 Mass. 235.

So, in Waterman *vs.* Andrews, 14 R. I., 589, cited by the Court of Appeals, if several plaintiffs join in ejectment, all must be entitled to possession; otherwise, by general rule, judgment must be given for the defendant.

If any one of the plaintiffs has no title to the land in question, though the other plaintiffs may have the whole title, no recovery can be had in this action. To entitle the plaintiffs to a verdict, all the plaintiffs must have the right to demand the possession."

DeMill *vs.* Lockwood, 3 Blatch. C. C., 61.

This is but an application to the action of ejectment of the broad and general rule, namely, that in all actions, whether *ex contractu* or *ex delicto*, too many plaintiffs are fatal.

In Marsteller *et al. vs.* McLean, 7 Cranch, 156, which was an action for mesne profits after a recovery in ejectment by the plaintiffs against the defendants, and therefore, the nearest possible analogy to an action of ejectment with fictions eliminated, this court held it to be a settled rule that "all the plaintiffs in a suit must be

competent to sue, otherwise the action cannot be supported."

So, in May *vs.* Slade, 49 Tex., 205, it is declared that, if one who has a good cause of action join in trespass *quare clausum fregit* with one who has no cause of action, the suit cannot be sustained, citing Murray *vs.* Webster, 5th N. H., 391.

The escape from this rule, universally prevailing in all actions, both *ex contractu* and *ex delicto*, seems to be sought, not in denying or attacking the rule, but in claiming that the action of ejectment is unclassified, and is neither *ex contractu* nor *ex delicto*.

Inasmuch as the action of ejectment is, in its original, a trespass, it is difficult to see how the abolition of fictions takes it out of the category of actions for tort; or why, or how, even if it were thus converted into a third and hitherto unknown class, as claimed, it has been exempted from a rule universally applicable to all forms of procedure hitherto known to the law.

The argument of the learned counsel for the appellants, however, that the admission of tenants in common to sue together in ejectment leaves them the representatives of separate and distinct interests, has an important bearing upon the question of the jurisdiction of this court in cases of this character. But for such admission, each tenant in common must have filed a separate suit, and could have had no appeal to this court, unless his separate interest involved the requisite pecuniary value. Was it the object, or the effect, of this admission to permit them to gain, by uniting their separate interests in one suit, an appeal to which no one of them is entitled?

Distinct judgments in favor of, or against, distinct parties, though in the same record, cannot be joined to give this court jurisdiction.

Tupper et al. *vs.* Wise, 110 U. S. 398.

And the burden is upon the plaintiff in error to show the jurisdiction.

Johnson et al. *vs.* Wilkins, 116 U. S. 392.

It is respectfully submitted that the judgment of the court below should be affirmed.

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